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IN THE

Supreme Court of the United States

(October Term, 1953)

No. 537

UNITED AIR LINES, INC.,

Petitioner,

vs.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, JR., Individually and as Member of the National Mediation Board,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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UNITED AIR LINES, INC.,

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vs.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner United Air Lines, Inc. ("United"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on March 12, 1964 in Case No. 17,777, *United Air Lines, Inc.* v. *National Mediation Board, et al.* (Appendix A, *infra*), affirming the order of the district court dismissing United's complaint and granting summary judgment to respondents (Appendix C, *infra*).

OPINIONS BELOW.

The opinion of the Court of Appeals, printed as Appendix B to this petition, is not yet reported. The order of the District Court, printed as Appendix C to this petition, is not reported. There was no written opinion by the District Court.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered on March 12, 1964 (Appendix A, *infra*). Petition for rehearing was denied on April 14, 1964 (R. 167). Jurisdiction is conferred on this Court by 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED.

1. The National Mediation Board refused to hold a hearing at the request of United on the question of the appropriate craft or class of employees among whom an election was to be held to determine a representative for bargaining under the Railway Labor Act. The stated reasons for the refusal were that the Board did not consider United to be a party in interest on the question and that the labor organizations involved had agreed on the unit. The Board took no evidence on the craft or class question, and accepted the agreement of the labor organizations without independent inquiry. The questions presented are:

   a. Does a carrier have a constitutional due process right to be heard by the Mediation Board on the craft or class issue?

   b. May the Board make a craft or class determination arbitrarily by accepting the division of employees agreed upon by interested labor organizations without consideration of any other relevant criteria?

   c. Does a carrier have judicial standing to raise the foregoing questions?

2. The form of ballot used in a representation election by the Mediation Board does not permit an eligible employee to cast a valid ballot for no representation. The questions presented are:

a. Does this form of ballot violate the mandate of the Railway Labor Act that the majority of employees in the craft or class have the right to select the representative for the craft or class?

b. Does a carrier have judicial standing to complain of the ballot form?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Involved are the Fifth Amendment to the United States Constitution and Sections 2 Fourth and Ninth of the Railway Labor Act, 48 Stat. 1187-88, 45 U. S. C. § 152. These provisions are printed as Appendix D to this petition.

STATEMENT.

In this case the Court of Appeals affirmed an order of the district court granting defendants' motion for summary judgment. The facts as they appear from the uncontradicted affidavits and the documents atttached thereto are as follows:

The Scope of the Bargaining Unit.

United is an air carrier subject to the Railway Labor Act. It employs approximately 32,000 persons. Of these, approximately 4,500 are office and clerical employees such as typists, stenographers, file clerks, electronic computer and office machine operators, receptionists and telephone operators; approximately 5,100 are public contact employees, such as reservation and ticket sales agents, vacation booking agents, passenger agents, station agents and other employees whose duties are performed primarily with and before the public; and approximately 3,100 are ramp and stores employees, who, among other duties, load, stow, unload, pick-up and deliver cargo, baggage and food, on. to and from aircraft at ramps and terminals; clean aircraft in connection with through service, maintain the ramp area and equipment; perform storeroom work, including the receiving, checking, inspecting, shipping, issuing, inventorying and storing of materials, supplies and equipment (JA 15-16, 106-08).*

The office, clerical and public contact personnel at United have never organized for collective bargaining purposes. However, the ramp and stores employees have been organized as a separate group for over 20 years, and since

* References are to the printed Joint Appendix in the Court of Appeals.

1948 have been represented by the International Association of Machinists ("IAM") (JA 16). On Capital Airlines, however, which in 1961 was merged with United, all three groups of employees had been represented by the Brotherhood of Railway Clerks ("BRC") (JA 103).

Although in 1947, with respect to four airlines, including Capital but not United (No. R-1706, 1 NMB Determinations 423), the National Mediation Board found that all of these groups of employees should be joined in one craft, as they were on the railroads, subject to re-examination on any particular airline when necessary to further the purposes of the Act, the Board found in 1953 that "because of the expansion and growth of the airline industry • • • as well as the development of representation of airline employees" it would upon proper application "re-examine the determination in Case R-1706." Case No. R-2357, 2 NMB Determinations 66, 67 (1953). In 1956 the Board made such a re-examination and found that on only six out of 30 carriers was the R-1706 classification being followed. Case Nos. C-2252, C-2389, 3 NMB Determinations 16 (1956). In the cases last cited, the Board refused to follow the R-1706 classification, and separated the stock clerks from the other groups of employees. In December, 1963, the Board again refused to follow its 1947 determination in a case involving Eastern Air Lines. There the Board directed a separate election among stock clerks at Eastern over the contention of the IAM (a participant in the case) that stock clerks are part of the R-1706 classification (Case R-3639, December 5, 1963).

On August 24, 1962, after United's merger with Capital, the BRC invoked the services of the Board to investigate a representation dispute among United's "clerical, office, stores, fleet [ramp] and passenger [public contact] service" employees, excluding, however, those ramp and stores employees hired by United prior to August 24, 1962 (JA

31). The BRC was willing to leave the excluded employees to the IAM, which had represented them as a separate group since 1948. The BRC application was docketed as NMB Case No. R-3590.

The IAM objected to the BRC application. As a result the BRC amended the application to cover all (a) clerical, (b) public contact, and (c) ramp and stores employees, including those represented by the IAM whether hired after August 24, 1962 or before (JA 43, 47). The IAM did not object to this bargaining unit, and the Board, without further factual inquiry, acquiesced in the unit to which the two unions had agreed, although it was also apparently willing to proceed with an election among only the groups not previously represented by the IAM if the two unions would have agreed to that (JA 135, 138, 142). The bargaining unit thus created would have lumped together United's most highly skilled technical white collar employees and its least skilled common labor employees, including janitors. United's skilled blue collar workers—its mechanics —are members of a separate craft or class.

When the BRC first invoked the Board's services, the Board also asked United to submit any statement it cared to make. In reply, United noted the BRC's improper exclusion of employees on the basis of date of hiring and asked the Board to dismiss the application. United added that if the Board should not dismiss the application, it "should then hold a public hearing to determine whether or not the proper craft or class is that expressed in prior determinations by the Board, or whether the proper craft or class is something other than that previously determined by the Board" (JA 39).

On January 11, 1963, after the BRC amended its application, United again asked the Board to hold a hearing on the craft or class question. United called attention to the fact that on most airlines the R-4706 classification of

all of these groups as a single bargaining unit was inappropriate and had not been followed either by the carriers or by the Board (JA 55). The Board denied this request and a subsequent request for consideration, noting that the "two organizations which are parties to the dispute are in agreement . . ." (JA 71). The reasons assigned by the Board for its denial were:

> ". . . that the Carrier is not a party to this matter, and also . . . that neither of the organizations who are parties to this case [IAM and BRC] have made any request for a hearing on the question of craft or class. The Board, therefore, denied the request of United for such a hearing." (JA 99).

The Form of the Ballot.

Concurrently with the correspondence relating to the matter of a hearing on the craft or class question, United requested the Board to alter its customary form of ballot to permit an employee to vote for "no union." United's request was based on legislative history, which it cited to the Board, showing that Congress intended employees subject to the Railway Labor Act to be free to vote for or against representation, and also on the analogy of the practice under the National Labor Relations Act which embodies the same statutory scheme (JA 73).

The form of ballot which the Board has used in the past and which it had planned to use in the United election does not contain space for a "no representation" vote as does the ballot used by the National Labor Relations Board (JA 101). The Mediation Board's practice is to provide space to vote only *for* the labor organization or organizations seeking representation rights, and an additional blank for "any other organization or individual" (JA 81).

A Mediation Board election is valid only if a majority of the eligible voters cast valid ballots. A majority of the

valid ballots cast is sufficient to elect a representative. A ballot is valid only if cast *for* a representative. A ballot upon which is written "no representative" or which is cast blank by the voter is voided (JA 7). There is no way for an employee opposed to representation by any union effectively to indicate his wishes.* The Board's form of ballot makes it possible for a minimum of 25% plus one of the employees to elect a bargaining representative for the entire craft or class, despite the desire of a majority of employees either to remain unrepresented or at least not to be represented by the labor organization so elected (JA 7-8).

The Board declined to change its form of ballot, stating that "introduction of a 'yes' or 'no' ballot would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees. . . ." (JA 86).

On February 7, 1963, the Board wrote to United: "The Board will proceed with an election among the employees concerned in NMB Case No. R-3590 under the Board's usual policies and procedures in such cases." (JA 98).

Proceedings in the Courts Below.

United filed its complaint four days later, alleging in the first count, that it had been deprived of its rights under the statute and the due process clause by the Board's arbitrary and capricious acceptance of whatever craft or class was agreed upon by the labor organizations involved, and by the Board's refusal to hold a hearing addressed to the craft or class issue in which United as a party could

* He can refuse to vote at all, but the Board refuses to tell the employees that if they oppose representation by a union, they should express their position by staying away. Employees would otherwise, in ignorance, believe that they ought to vote in order to express their wishes.

produce evidence demonstrating the inappropriateness of the Board's craft or class determination (JA 4). The second count alleged that the form of ballot which the Board insisted on using was inconsistent with the employer's statutory duty to treat with the representative chosen by the majority of a craft or class of its employees, and invaded its right not to be required to bargain for a craft or class with a representative not favored by the majority (JA 6).

The complaint alleged that the composition of a craft or class of employees for collective bargaining purposes affected valuable property rights of an employer in the conduct of its business, and that the combining of the 12,700 employees performing work in many different and unrelated classifications, such as electronic computer operators, ticket agents, and cleaning women, into a single craft or class would have a substantial and adverse impact on the operations and cost of conducting United's business (JA 5).

The complaint sought to restrain the Board from holding the election unless the form of ballot was corrected and United was given a hearing as to the proper scope of the bargaining unit. The complaint did not seek judicial review of any substantive determination as to the scope of the unit, but only to compel the Board to make the determination in accordance with the requirements of the statute and of due process. Federal jurisdiction was based on 28 U. S. C. §§ 1331 and 1337.

Following the filing of the complaint, United moved for a preliminary injunction (JA 11), and the Board moved to dismiss the complaint or for summary judgment on the grounds that United lacked standing to maintain the action; that the complaint failed to state a justiciable controversy and that United was not entitled to injunctive relief because the action was premature, irreparable injury was not demonstrated and the action of the Board

was not erroneous (JA 110). Affidavits were filed by both parties in support of their respective motions (JA 14, 103, 106, 111, 135, 142).

The District Court (per Judge Matthews) granted the Board's motion for summary judgment, and dismissed the complaint in a brief order which did not state any reason for the court's action and which found only that "there is no genuine issue of material fact." (JA 144; Appendix C, *infra*).

Shortly after the dismissal of United's complaint, a group of United employees filed a complaint in the District Court against the Mediation Board which attacked the form of ballot and the Board's refusal to grant the employees a hearing on the craft or class question. The BRC intervened in support of the position of the Mediation Board. Judge Youngdahl issued a permanent injunction restraining the Board from conducting an election with a form of ballot which does not permit a voting employee to cast a vote against representation, and remanded to the Board for further consideration the employees' request for hearing on the question of the appropriateness of the craft or class. *Association for the Benefit of Non-Contract Employees* v. *National Mediation Board*, 218 F. Supp. 114 (Dist. Col., 1963).

United appealed from the dismissal of its complaint in this action, and the Mediation Board and BRC appealed from the judgment entered by Judge Youngdahl. The three appeals were consolidated in the Court of Appeals. In a *per curiam* opinion, that Court affirmed the decision of Judge Youngdahl in the employees' suit, and also affirmed the dismissal of United's complaint in this case (Appendix B, *infra*).

The Court of Appeals noted that the grounds for dismissal of United's complaint were not stated in the dis-

trict court's order, but stated that "as one of the grounds urged was lack of standing on the part of United Air Lines, we assume it was on this ground that the suit was dismissed." The Court then stated:

> ". . . The close question as to United's standing, about which there is a dearth of authority, causes us concern. We have decided, however, not to disturb the District Court's dismissal, because our decision in the other two cases affords the relief concerning the form of the ballot which United sought." (*infra*, p. v-vi.)

United petitioned for rehearing, pointing out that although the action of the Court of Appeals in affirming Judge Youngdahl's order may have resolved the ballot question it left completely unanswered the issues relating to United's right to be heard on the craft or class question and the Board's duty in making such a determination. The petition requested the Court, therefore, to decide the "close question" of United's standing (R. 157). This petition was denied on April 14, 1964 (R. 167).

United has been advised that the BRC intends to petition for a writ of certiorari to review the affirmance of Judge Youngdahl's order; since that order may be subject to further review, this petition raises the question of United's standing with respect to the ballot issue as well as its standing to complain of the Mediation Board's method of determining the appropriate craft or class.*

*We have not been advised whether the National Mediation Board will petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT.

This case presents two questions of importance in the administration of the Railway Labor Act.

The first relates to the interest of an employer in the procedure by which the National Mediation Board determines craft or class—or bargaining unit—questions. United's position is that it is a violation of its right to procedural due process and in derogation of the Board's statutory duty for the Board to make this determination arbitrarily and without fair hearing. There is no reason why an employer whose labor relations are regulated by the Railway Labor Act should be in any different position in this respect than an employer under the National Labor Relations Act. Yet the Mediation Board's contention is that an employer has no interest in the bargaining unit and hence has no right to complain if the Board refuses to hear it, while the National Labor Relations Board has always accorded the employer the right to be heard. This case challenges the fairness of the procedure of the National Mediation Board. Since *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943), forecloses review on the merits of Mediation Board determinations, it is imperative that the Board be required to hear all interested parties and to exercise its statutory duty fairly and rationally if due process is to be observed. The presence of a fair hearing procedure by the National Labor Relations Board, and the opportunity for ultimate judicial review on the merits, distinguishes *Boire* v. *The Greyhound Corp.*, 84 S. Ct. 894 (1964).

The second question relates to the form of ballot used

by the Mediation Board in representation elections. This question is presented here conditionally because of the affirmance by the Court of Appeals in the consolidated appeal below of Judge Youngdahl's order restraining the Board from conducting an election unless the ballot permitted an eligible employee to cast a valid vote for no representation. If certiorari to review that judgment is denied, the question as to the ballot becomes academic insofar as this case is concerned. If the BRC petition is granted, however, United respectfully requests that this petition be granted as to both questions presented so that it may be heard on the ballot question as well as the craft or class issue.

It was because of its affirmance of Judge Youngdahl's injunction order that the Court of Appeals concluded not to decide the "close question" of United's judicial standing, finding that its decision in the companion cases "affords the relief concerning the form of ballot which United sought." Appendix B, *infra*, pp. v-vi. But this conclusion was clearly a *non sequitur* since it ignored United's interest in the bargaining unit question, which was independent of the form of ballot.

I. THE EMPLOYER'S RIGHT TO BE HEARD.

A. United Has an Interest in the Scope of the Bargaining Unit.

The economic interest of an employer in the composition or structure of a collective bargaining unit of its employees —never doubted under the National Labor Relations Act, which applies to all interstate industry except rail and air carriers—entitles it to be heard administratively on the effect of a proposed unit and to suggest alternative units.

The complaint here alleged that the composition of a craft or class of employees for collective bargaining pur-

poses affects valuable property rights of United in the conduct of its business, and that the combining into one craft or class 12,700 of United's employees in such unrelated classifications as electronic computer operators, ticket agents and cleaning women will have a substantial and adverse impact on the operations and cost of conducting United's business (JA 5). United's affidavits detailed how such a craft or class is inconsistent with United's organizational structure, and the effect such a craft or class would have on the business of United, its efficiency and its ability properly to perform its public service function (JA 16-17, 24-26, 106-109).

The purpose of a bargaining unit determination is to provide a rational basis of grouping employees for bargaining purposes. In the Mediation Board's words, it is intended that the craft or class will reflect "the functions, duties and responsibilities of the employees" and the "community of interest existing between jobs" (JA 28). The scope of the unit inevitably has impact upon the manner in which an employer organizes his work force. Issues such as seniority, transfers, job posting and bidding rights tend to be common to the entire craft or class. If the craft or class truly represents a community of interest, the result is mutually advantageous. If not, the disruptive effect on the employer's business may have serious economic consequence.

This appears from the affidavit of C. P. Hutchens, who was the Director of Personnel for Capital Airlines prior to its merger into United. That affidavit described the serious impact on Capital resulting from a single collective bargaining agreement for the "clerical" craft or class made up of so many and diverse job classifications, including the cost of employee retraining and impairment of employee morale and efficiency as the result of trans-

fers from and into classifications having no functional similarity (JA 103-5).

Aside from its impact on the conduct of United's business, this craft or class determination has obvious impact on United's right to freedom of contract. Here, for example, the craft or class determination poses the substantial probability that United will no longer be able to bargain separately with its ramp and stores employees—part of the craft or class established here—as it has with the IAM voluntarily since 1948. For once a representative for the craft or class is selected, United will be under an obligation to bargain with that representative for that craft or class, and with no other representative for any of the employees in that craft or class. *Virginian Railway Co.* v. *System Federation,* 300 U. S. 515, 548 (1937).

B. United Has Judicial Standing to Assert a Denial of Due Process.

United's right to carry on its business free of the restraint of an arbitrarily determined craft or class and its right to contract freely with its employees in other bargaining units unless these rights are limited in accordance with the procedural requirements of due process, gives it standing to complain judicially of the Mediation Board's procedure.

The potential effect on United of the scope of the bargaining unit is analogous to the effect of the Federal Communications Commission regulations reviewed in *Columbia Broadcasting System* v. *United States,* 316 U. S. 407 (1942). There CBS complained that the FCC regulations relating to the withdrawal of licenses of radio stations whose contracts with networks contained certain proscribed provisions impaired its ability to conduct its business, would make its operations more costly, reduce its earnings

and render its property and business less valuable. In reversing the dismissal of the complaint for lack of jurisdiction, the Court stated, *inter alia:*

> "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked." at 422.

The interest of United here is certainly no less substantial than was that of the association in *National Motor Freight Traffic Ass'n* v. *United States*, 372 U. S. 246 (1963), where the Court held that the association had judicial standing to complain of an I. C. C. freight regulation which did not affect it but only its member carriers.

An employer's right to procedural due process in determinations affecting its labor relations have always been recognized by this Court, and its judicial standing to complain of alleged violations of this right have been assumed without question. Constitutional attacks on legislation in this area have been entertained and disposed of in this Court not on the ground that the employer had no constitutional right to complain but because the legislative restriction in issue was held not to be an unreasonable restraint on the employer's right to carry on its business. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 570 (1930); *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 541, 553 (1937); *NLRB* v. *Jones & Laughlin*, 301 U. S. 1, 43-44 (1937).

In *Pittsburgh Plate Glass Co. v. NLRB*, 313 U. S. 146, 154-55 (1941), the employer attacked a bargaining unit determination of the National Labor Relations Board on the ground, among others, that the NLRB procedure denied due process of law. The contention was disposed of on the ground that the procedure was fair, not that the employer had no standing to be heard.

Recently the Court of Appeals for the Tenth Circuit held that an employer under the National Labor Relations Act was entitled to a due process hearing on the issue of the appropriateness of the bargaining unit determined in a representation proceeding. The case was remanded to the NLRB for redetermination in light of evidence proffered by the employer but rejected by the Board. *NLRB v. Ideal Laundry & Dry Cleaning Co.*, 56 LRRM 2036 (C. A. 10, No. 7381, April 23, 1964).

The employer under the Railway Labor Act has the same interest, since under each statute he is required to bargain with the representative chosen by the majority of the designated unit.

C. The Switchmen's Union Case Does Not Prevent the Courts from Requiring the Mediation Board to Provide a Fair Procedure.

In support of its position that United lacks judicial standing to complain of Board procedures, the Mediation Board places primary reliance on *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943), which held that craft or class determinations were not subject to judicial review.

Since United does not seek review of the merits of the Board's determination but only that the Board be required to make that determination on the basis of evidence and in accordance with the requirements of the statute and of

procedural due process, the reliance on *Switchmen's* is misplaced.

In any event, *Switchmen's* did not foreclose review of constitutional questions, nor did it insulate the Board from judicial inquiry as to whether it was exercising the duty imposed on it by the Railway Labor Act.

Switchmen's was initiated by a labor union which protested a determination made after hearing by the Board that a craft or class had to be system-wide and include all employees of the carrier in the classification. The Court noted that there was no provision for review of craft or class determinations under the Railway Labor Act, and reasoned that since Congress had created the "right" of majority representation, "*all constitutional questions aside*, it is for Congress to determine how the rights which it creates shall be enforced." 320 U. S. at 301. (Emphasis added.)

But the "rights" which Congress created established correlative limitations on the prior rights of carriers; hence the Railway Labor Act imposed the duty on employers to "treat with" or bargain with the "true representative" of the craft or class. This duty is enforceable by injunction. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937).*

Thus the origin of the right asserted by the labor union in *Switchmen's* is not the same as that asserted by United

* An air carrier's obligations under the Railway Labor Act are also enforceable through proceedings before the Civil Aeronautics Board under Section 401(k)(4) of the Federal Aviation Act of 1958 (49 U. S. C. § 1301, *et seq.*). This section provides that compliance with the Railway Labor Act is a condition of the carrier's holding its certificate of public convenience and necessity. In such a proceeding before the C.A.B. the carrier would be foreclosed from raising any questions as to the propriety of the designation of a bargaining representative by the Mediation Board. See *Southern Pilots Ass'n* v. *Civil Aeronautics Board*, 323 F. 2d 288, 290 (C. A. D. C., 1963), cert. den. 84 S. Ct. 966 (1964).

here. United's right was not created by Congress, but rather was limited by Congress. Hence even if this case sought judicial review of the merits of the Board's craft or class determination it would not be barred by *Switchmen's*. This case raises the constitutional question expressly reserved.

As a preliminary step to its holding that Board craft or class determinations are not reviewable, the Court held in *Switchmen's* that Congress had imposed on the Board the duty to make such determinations. That the Court did not intend to foreclose all judicial examination of the exercise of this duty is apparent from a footnote comment in *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323, 336 n.12 (1943), decided the same day:

> "Whether judicial power may ever be exerted to require the Mediation Board to exercise the 'duty' imposed upon it under § 2, Ninth and, if so, the type or types of situations in which it may be invoked present questions not involved here."

The instant case involves the Board's obligation under the Constitution and the statute to utilize fair procedure in making the craft or class determination. *Switchmen's* is no bar to review of the Board's failure to exercise this duty.

D. The Board Was in Error in Denying United Administrative Standing and in Accepting Whatever Bargaining Unit the Unions Agreed Upon.

This petition raises the question not only of United's judicial standing to complain that the Board procedures denied it procedural due process but the merits of the Board's position that United lacks administrative standing as a party in interest on craft or class determinations. The Court of Appeals' failure to decide the "close ques-

tion" of United's judicial standing has the effect of deciding adversely to United, without any judicial inquiry, the ultimate question of the Board's duty and United's rights before the Board.

The Board's position on the ultimate question is that United as an employer may not be a party to a representation dispute under Section 2 Ninth of the Railway Labor Act. The implicit assumption is that if labor organizations which the Board recognizes as parties in interest are in agreement on the bargaining unit, then the Board has no obligation to exercise its own discretion or to hear from the objecting employer.

The Board fails to differentiate between the determination of the scope of the bargaining unit and the selection of the representative once the unit is determined. The former is the Board's business, as an administrative agency. Persons having an economic interest in the matter have a right to be heard. The selection of the representative for the designated unit is the business of a majority of the employees, from which the employer is properly excluded. But his exclusion from this part of the process does not warrant excluding him from the determination of the scope of the bargaining unit, in which he has a substantial interest.

The distinction was clearly drawn by the District of Columbia Court of Appeals in *UNA Chapter, Flight Engineers International Association* v. *National Mediation Board*, 294 F. 2d 905, 908 (1961), cert. den. 368 U. S. 956 (1962), where the Court stated:

> "Under the Railway Labor Act only the NMB (or the committee designated by it) has the power to make craft or class determinations . . . The right given to employees is that of designating, by a majority of those comprising a 'craft or class,' their representatives."

The Mediation Board's view of its power and duty to make craft or class determinations on the basis of relevant evidence was clearly stated to this Court in the Board's brief in opposition to the Flight Engineers Association petition for a writ of certiorari in the *UNA Chapter* case:

> "On the merits, petitioner's objections are equally unavailing. In essence it claims that once a craft or class is recognized it may not change. Petitioner relies on the fact that it represented the flight engineers in past bargaining with the carrier. However, *Congress has charged the Board* (or its Committee) *with a duty to find the craft or class to be whatever it is, not what it used to be.* Where employees—such as pilots and flight engineers in this age of jets—change in function, duties, interests, skills and responsibilities as a result of technological development in the industry, *the Board must recognize the change.* Notwithstanding petitioner's assertions, the Board neither destroyed nor created a craft or class. Pursuant to the directive of Section 2 Ninth, of the Railway Labor Act, it made a finding that there is today an existing craft or class of flight deck crew members." (Brief in Opposition of National Mediation Board, Supreme Court No. 531, October Term, 1961, pp. 13-14. Emphasis added.)

Nothing in the Railway Labor Act or in the Board's statement to this Court of its duty under the Act justifies the failure of the Board to make a rational determination of the craft or class here solely because two competing labor organizations agreed on how to split up United's employees. It may well have been that if the Board had heard United's evidence concerning the impact of electronic computers on reservations systems, record keeping and billing and the resulting "change in functions, duties, interests, skills and responsibilities" of its employees, it might have found another craft or class appropriate despite the agreement of the IAM and BRC. As the Board has elsewhere acknowledged, ". . . In the Board's investi-

gation of such matters under Section 2, Ninth, of the Act, it must rely on the carrier for information needed in considering the dispute." *Eastern Air Lines*, NMB Case No. R-3639, December 5, 1963.

The Board suggested below that its determination here was not arbitrarily made, but simply manifested adherence to its 1947 determination in R-1706. Even if that were true, decision on such a ground would fly in the face of the Board's statement to this Court in the *UNA Chapter* case that Congress charged it "with a duty to find the craft or class to be whatever it is, not what it used to be." We have shown at p. 5, *supra*, that the Board has not blindly followed R-1706 in other cases in which evidence was taken. Indeed, the unit lines approved in that case are recognized on only one-fifth of the air carriers.

Moreover, affidavits in this proceeding demonstrate that the Board was prepared to accept a different craft or class if the two labor organizations had agreed to a different unit. The record includes a letter from the IAM to the BRC, sent after the latter amended its application to include employees then represented by the IAM, in which letter the IAM commented on the possibility of the craft or class being again amended to exclude the IAM-represented employees. This letter states:

> "After discussing this matter further with the National Mediation Board, we were assured that if an agreement could be reached between your Organization and our Organization, which would exclude all employees in the craft or class presently represented by our Organization, the Board would conduct an election among the remaining employees in the craft or class without establishing a precedent that could be used by any other organization on any other property." (JA 139).

The complaint alleged that the determination was arbitrarily and capriciously made without any hearing and

without consideration of its effect on United. The record clearly supports the conclusion that the Board simply accepted the grouping agreed upon by the two unions and made no independent inquiry or determination.

This Court has elsewhere commented upon administrative determinations arbitrarily and capriciously made:

> "The Executive Order contains no express or implied attempt to confer power on anyone to act arbitrarily or capriciously—even assuming a constitutional power to do so . . . An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination.' It is implicit in a government of laws and not of men." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 136 (1951).

II. THE BALLOT QUESTION.

Section 2 Ninth of the Railway Labor Act establishing election procedures for determining bargaining representatives was added by the 1934 amendments to the Act. 48 Stat. 1188. The constitutionality of this section was attacked in *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937), by an employer who contended that the provision denied it due process since it imposed an obligation on the employer to negotiate with a labor organization authorized to represent its employees and restrained it from making agreements with any other labor organization (at 541). The Court held that the statute imposed the affirmative duty to treat only with the "true representative" and the negative duty to treat with no other. The Court concluded that the "limited duties" imposed "cannot be said to be so arbitrary or unreasonable as to infringe due process." (at 548-49, 558-59.)

The employer in *Virginian* also challenged the certifi-

cation of a particular representative on the basis of its having received a majority of the votes cast, not a majority of those eligible to participate. The Court held that this procedure was not inconsistent with Section 2 Fourth of the Act which gives to the majority of the employees in a craft or class the right to determine the bargaining representative. The Court held that the non-voter is "presumed to assent to the expressed will of the majority of those voting" and added that otherwise "an indifferent minority could prevent the resolution of a contest." 300 U. S. at 560.

The Board's ballot, by not permitting an eligible employee to cast a valid ballot for no representative, enlarges the "limited duty" imposed by the Act and does not insure that the certified representative will be or can reasonably be presumed to be the "true representative" of the majority of the employees. For since the Board will consider an election to be valid if a majority of the eligible voters participate, and will certify on the basis of a majority of those participating, then 25% plus one vote will be sufficient to select the representative. The rationale of *Virginian* was that the non-voter is presumed to assent to the will of the majority of those voting. But if the non-voter has no way of expressing his desire to be unrepresented except by not voting, then the presumption falls. It can hardly be presumed that he assents to the choice of those voting, if his very reason for not voting is that he desires none of the available choices.

The Board justifies this illogical result on the ground that there is a Congressional mandate that employees designate representatives and that a ballot which permitted employees to vote for no representation would circumvent this mandate (JA 86). Thus the Board converts the "right" given employees under Section 2 Fourth of the

Railway Labor Act to select a bargaining representative into a "duty" to do so.

This result is completely contrary to the practice of the National Labor Relations Board operating under statutory provisions completely analogous in this respect to those of the Railway Labor Act. Cf. Sections 2 Fourth and Ninth of the Railway Labor Act and Sections 7 and 9(a) of the Wagner Act (Appendix D, *infra*, pp. xiv-xvi). See *NLRB* v. *Jones & Laughlin*, 301 U. S. 1, 44 (1937), holding Section 9(a) of the Wagner Act to be the analogue of Section 2 Ninth of the Railway Labor Act, and *Associated Press* v. *NLRB*, 301 U. S. 103, 130 (1937), to the same effect. The National Labor Relations Board has always permitted an employee to cast a valid ballot for no representation. *Interlake Iron Corporation*, 4 NLRB 55 (1937); JA 101.

That the National Labor Relations Board practice, rather than that of the National Mediation Board, conforms to Congressional intent is clear from the legislative history of Section 2 Ninth of the Railway Labor Act. The 1934 amendments to that Act were drafted by Joseph B. Eastman, and his views on the amendments have been accepted as authoritative by this Court. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 302 (1943). Commissioner Eastman testified before Congress that the bill—

> "does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be." (Hearings on H. R. 7650, House Comm. on Interstate and Foreign Commerce, 73rd Cong. 2d Sess. 1934, p. 57.)

Senator Wagner, in response to a criticism of an industry witness that the amendments would have the effect of compelling employees to join unions, stated:

"I didn't understand these provisions compelled an

employee to join any particular union. I thought the purpose of it was just the opposite, to see that the men have absolute liberty to join or not join any union or to remain unorganized." (Hearings on S. 3266, Sen. Comm. on Interstate Commerce, 73rd Cong. 2d Sess. 1934, p. 76.)

There are additional examples in committee reports and hearings to the same effect. None supports the Board's position that it was the intent of Congress that an employee be required to select a representative. See H. Report 1944, House Comm. on Interstate and Foreign Commerce, 73rd Cong. 2d Sess. 1934, p. 2; Hearings on S. 3266, Sen. Comm. on Interstate Commerce, 73rd Cong. 2d Sess. 1934, p. 12.

Since the Board's ballot does affect and enlarge upon obligations imposed on United as a carrier under the Railway Labor Act, United has judicial standing to complain that the Board's ballot is inconsistent with the requirements of the Act. Hence if the Court should grant certiorari to review the affirmance of Judge Youngdahl's order restraining the use of an improper ballot by the Board, United's petition respecting this point should also be granted so that it may have an opportunity to present its views to the Court.

CONCLUSION

It was not United's position below, and it is not its position here, that this Court or any court should decide the appropriate craft or class, or that United is not subject to regulation in this area. United does not deny the authority of the Mediation Board to make craft or class determinations. United's position is simply that it has the right to be heard by the Board and have its position given serious consideration.

The Board has complained below that this litigation has delayed the resolution of a representation dispute, and has frustrated the Congressional intent as expressed in *Switchmen's* that once the Board exercised its duty to determine the craft or class, "There was to be no dragging out of the controversy into other tribunals of law." 320 U. S. 297 at 305. Prompt resolution of this dispute is as important to United as it is to the interested labor organizations, its employees or the public. But promptness is no excuse for arbitrary action, or for failure by the Board to exercise the duty imposed on it by the Railway Labor Act, or for the flouting of United's right to be heard. The important questions as to whether the Board's procedure was arbitrary, unfair and unlawful and whether an aggrieved carrier has any remedy against such procedure should be determined by this Court, so that hereafter representation disputes may be settled fairly as well as promptly.

United respectfully requests that for the foregoing reasons this petition be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

September Term, 1963.

No. 17,777 United Air Lines, Inc., *Appellant,* *vs.* National Mediation Board, et al., *Appellees.*	Civil 402-63
No. 18,068 National Mediation Board, et al., *Appellants,* *vs.* Association for the Benefit of Non-Contract Employees, *Appellee.*	Civil 973-63
No. 18,072 Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, *Appellant,* *vs.* Association for the Benefit of Non-Contract Employees, *Appellee.*	Civil 973-63

Appeals from the United States District Court for the District of Columbia.

Before: WILBUR K. MILLER, BASTIAN and WRIGHT, *Circuit Judges.*

JUDGMENT.

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court:

(1) that the judgment of the District Court on appeal in cases Nos. 18,068 and 18,072 is hereby affirmed; and

(2) that the judgment of the District Court on appeal in case No. 17,777 is also affirmed.

Per Curiam.

Dated: March 12, 1964.

Separate opinion by Circuit Judge Wright concurring in affirmance in case No. 17,777 and dissenting from affirmance in cases Nos. 18,068 and 18,072.

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

No. 17,777

United Air Lines, Inc., *Appellant*

vs.

National Mediation Board, *et al.*, *Appellees*

No. 18,068

National Mediation Board, *et al.*, *Appellants*

vs.

Association for the Benefit of Non-Contract Employees, *Appellee*

No. 18,072

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, *Appellant*

vs.

Association for the Benefit of Non-Contract Employees, *Appellee*

Appeals from the United States District Court for the District of Columbia

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Decided March 12, 1964

Mr. Stuart Bernstein, with whom *Mr. James Francis Reilly* was on the brief, for appellant in No. 17,777.

Mr. Milton Kramer, with whom *Mr. James L. Highsaw, Jr.*, was on the brief, for appellant in No. 18,072.

Mr. Howard E. Shapiro, Attorney, Department of Justice, with whom *Assistant Attorney General Douglas*, *Messrs. David C. Acheson*, United States Attorney, and *Morton Hollander*, Attorney, Department of Justice, were on the brief, for appellees in No. 17,777 and for appellants in No. 18,068.

Mr. Alex L. Arguello, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of court, with whom *Mr. Jerome C. Muys* was on the brief, for appellee in No. 18,068 and No. 18,072. *Mr. David Booth Beers* also entered an appearance for appellee in No. 18,068 and No. 18,072.

Mr. John E. Stephen filed a brief on behalf of Air Transport Association of America, as *amicus curiae*, urging reversal in No. 17,777.

Mr. William G. Mahoney filed a brief on behalf of Railway Labor Executives' Association, as *amicus curiae*, urging affirmance in No. 17,777.

Before WILBUR K. MILLER, BASTIAN and WRIGHT, Circuit Judges.

PER CURIAM: These three appeals have been consolidated by this court. In our view Nos. 18,068 and 18,072 should be disposed of first, although they are later in their numbering.

In No. 18,068, the National Mediation Board appeals from an order issued by the District Court which, among other things, restrains the Board from conducting a representation election.

In No. 18,072, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes appeals from the same order.

The order appealed from is as follows:

> ". . . ORDERED That the Board is hereby permanently enjoined from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation, and it is
>
> "FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U. S. C. § 151 et seq gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

The opinion of Judge Youngdahl, of the District Court, is found in 218 F. Supp. 114 (1963) and is adopted by us as the opinion of this court. It follows that the judgment of the District Court in these cases must be affirmed.

In No. 17,777, United Air Lines, Inc. appeals from the dismissal by the District Court of its action filed to enjoin the election proposed by the National Mediation Board. The grounds for dismissal of the action are not stated in the court's order but, as one of the grounds urged was lack of standing on the part of United Air Lines, we assume it was on this ground that the suit was dismissed. The close question as to United's standing, about which there is a dearth of authority, causes us concern. We have decided, however, not to disturb the Dis-

trict Court's dismissal, because our decision in the other two cases affords the relief concerning the form of the ballot which United sought.

No. 18,068 is affirmed.
No. 18,072 is affirmed.
No. 17,777 is affirmed.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part*: In No. 17,777 of this consolidated litigation, United Air Lines appeals from the District Court's refusal to enjoin the National Mediation Board from conducting a representation election under Section 2, Ninth, of the Railway Labor Act. 48 Stat., 1188, 45 U. S. C. § 152, Ninth. In Nos. 18,068 and 18,072, the National Mediation Board and the Brotherhood of Railway and Steamship Clerks appeal from the granting of an injunction against the Board, by the same court through a different judge, restraining it from conducting the same election which is the subject of the United Air Lines suit. The second injunction action was brought[1] by certain employees of United Air Lines who claim to want to represent themselves *individually* in their labor negotiations with their employer. I agree with the court that in No. 17,777 the United Air Lines injunction proceeding was properly dismissed by the District Court. I respectfully dissent from its affirmance in Nos. 18,068 and 18,072 upholding the issuance of the injunction against the National Mediation Board.

Since the United Air Lines suit and the action brought by some of its employees appear to have a common inspiration as well as common issues, I shall treat them together. Both United and its appellee employees, here called ABNE,[2] urge two grounds for enjoining the Board

1. The employees' action was brought after United Air Lines' application for an injunction was denied.

2. Association for the Benefit of Non-Contract Employees.

from performing its duty under the Act: (1) The Board improperly determined the bargaining unit craft or class to be "clerical, office, stores, fleet and passenger service employees"; and (2) the Board proposes to use in the election a form of ballot which does not provide a space for the employee to vote against representation.

The craft or class recognized by the Board as the proper bargaining unit for the proposed election is the same as that recognized in its 1947 proceeding. Case No. R-1706, Determinations of Craft or Class of the National Mediation Board (1947). There has been no change in the classification since that time. After considering the representations by United as to the need for change, the Board determined that it would follow its prior ruling. Thus United and ABNE would have the court reweigh these class considerations and substitute its judgment for the Board's.

With reference to the form of ballot, space is provided to vote for either of the competing unions.[3] A third blank space is indicated for voting for a representative not named on the ballot. That same blank space may be used for voting for "no union" or "no representation." Section 2, Fourth,[4] of the Railway Labor Act provides, in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Thus, if a majority of the craft or class actually votes for representation, a representative may be selected. If a majority fails to vote, the Board may not certify a representative. *Radio Officers' Union* v. *National Mediation Board*, 86 U. S. App. D. C. 319, 181 F. 2d 801 (1950). In addition, the admitted practice of the Board is to add the

3. The two competing unions shown on the ballot were the Brotherhood of Railway and Steamship Clerks and the International Association of Machinists.

4. 48 Stat. 1187, 45 U. S. C. §152, Fourth.

number voting "no union" to the number not voting in determining whether a majority of the employees eligible to vote actually voted for representation.

The District Court's action enjoining the Board from conducting the election here is in the teeth of a host of cases from the Supreme Court, from this court, and from the Circuit Courts around the country. In the interest of economy, I shall simply list *seriatim* the reasons why this injunction should not have been issued and briefly comment on each.

1. The District Court was without jurisdiction to enjoin the National Mediation Board from conducting an election to resolve the representation dispute at United Air Lines. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943). In upholding the action of the Board against union attack, the Court in *Switchmen's Union* said, "* * * if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say *on any aspect* of the problem, it would have made its desire plain." 320 U. S. at 303. (Emphasis added.) Unlike the National Labor Relations Act,[5] the Railway Labor Act has no provision for judicial review. *Switchmen's Union* was reinforced by three other cases[6] handed down by the Supreme Court at the same term, and the force of these decisions has continued, unmodified by Congress, down to the present day.[7]

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5. 49 Stat. 453, 29 U. S. C. § 159(d).

6. *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323 (1943); *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U. S. 338 (1943); and *Brotherhood of Railway & Steamship Clerks, etc.* v. *United Transport Service Employees*, 320 U. S. 715 (1943) (*per curiam*).

7. *Order of Railway Conductors* v. *National Mediation Bd.*, 79 U. S. App. D. C. 1, 141 F. 2d 366, *cert. dismissed*, 323 U. S. 166 (1944); *Radio Officers' Union* v. *National Mediation Board*, *supra*; *Rutas Aereas Nacionales, S. A.* v. *Edwards*, 100 U. S. App. D. C. 366, 244 F. 2d 784 (1957); *Decker* v. *Venezolana*, 103 U. S. App.

2. The ballot which the District Court has ordered changed before an election can be conducted has been used by the Board and its predecessor, the Railway Labor Board, since 1921 in over 3,400 elections. In the 43 years since 1921, Congress has not indicated the slightest disapproval of the Board's election machinery—including its ballot. Moreover, no court, except the District Court here, in the *ABNE* case but *not* in the *United* case, has found this ballot unlawful.[8] And this court has approved its use as a proper exercise of the Board's discretion within the intendment of the Act. *Decker* v. *Venezolana, supra* Note 7 (see briefs).[9]

D. C. 301, 258 F. 2d 153 (1958); *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board*, 111 U. S. App. D. C. 126, 294 F. 2d 910 (1961), *cert. denied*, 369 U. S. 810 (1962); *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd.*, 111 U. S. App. D. C. 121, 294 F. 2d 905 (1961), *cert. denied*, 368 U. S. 956 (1962); *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd.*, 114 U. S. App. D. C. 229, 314 F. 2d 234 (1962). Among decisions from other courts are *Brotherhood of Ry. & S. Clerks, etc.* v. *Virginian Ry. Co.*, 4 Cir., 125 F. 2d 853 (1942); *Rose* v. *Brotherhood of Railway and Steamship Clks.*, 4 Cir., 181 F. 2d 944, *cert. denied*, 340 U. S. 851 (1950); *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 2 Cir., 311 F. 2d 745, *cert. denied*, 373 U. S. 924 (1963); *Ruby* v. *American Airlines, Inc.*, 2 Cir., 323 F. 2d 248 (1963), *cert. pending*.

8. But *cf. McNulty* v. *National Mediation Board*, N. D. N. Y., 18 F. Supp. 494 (1936).

9. The *Decker* case involved the jurisdiction of the District Court to review the action of the Mediation Board. Paragraph 8 of the amended complaint there raised the same issue which is raised here:

> "[Due process was denied] in that the ballot used in the election had no space on it for a vote to the effect that the employee did not want anyone, defendant I. A. M. or anyone else, to represent him."

That issue was preserved on appeal, in paragraph 1b of the Questions Presented:

> "• • • the right to [due process] was denied by use of a ballot which gave no way to vote against representation by any bargaining agent."

Affirming the dismissal of the complaint, this court stated, "We hold that the prohibition of the Switchmen's case applies in the circumstances of this case." 103 U. S. App. D. C. at 302, 258 F. 2d at 154.

3. The Board's craft or class determination is unreviewable. This court has so held in at least four cases, one at the last term of court. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd., supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra* Note 7; *Radio Officers' Union* v. *National Mediation Board, supra.* The Fourth Circuit, in *Rose* v. *Brotherhood of Railway and Steamship Clks., supra* Note 7, 181 F. 2d at 946, summed it up well:

> "In the light of the decisions of the Supreme Court, there can be no doubt that the effect of this statute was to vest in the Mediation Board exclusive jurisdiction over the *certification of bargaining agents, the determination of bargaining units and the classification of employees for the purposes of bargaining.* And it is equally clear that the *exercise of discretion by the board with respect to such matters is not subject to review by the courts.* * * *" (Emphasis added.)

4. United Air Lines lacks standing to challenge the Board's action. The purpose of the Railway Labor Act is to guarantee employees complete freedom to organize—freedom from employer interference. This Act was passed, as the Government asserts, "to put an end to the harmful consequences of * * * individual dealing between large carriers and small employees. *Machinists* v. *Street,* 367 U. S. 740, 760; *Virginian Ry.* v. *Federation,* 300 U. S. 515, 553; *Texas & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, 570." United's obligation under the Act is *not "to interfere in any way with the organization of its employees."* Railway Labor Act, § 2, Fourth. (Emphasis added.) And this obligation includes refraining from filing, or inspiring, litigation de-

signed to block or delay representation elections conducted by the National Mediation Board.

5. There is no *Leedom* v. *Kyne*, 358 U. S. 184 (1958), question here. It is not even suggested that the Board has acted contrary to a plainly and expressly defined statutory duty, nor has the Board here conceded that it has so acted, as in *Leedom*. This principle has been expounded recently by this court in a series of cases so there should be no doubt about its application. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd.*, *supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra* Note 7. In the *UNA* case we said (111 U. S. App. D. C. at 124, 294 F. 2d at 908):

> "Appellant urges, however, that jurisdiction exists under the Supreme Court's decision in Leedom v. Kyne, 1958, 358 U. S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210. We cannot agree. In Leedom the Supreme Court carefully differentiated Switchmen's Union from the case before it, pointing out that the latter did not involve 'review' of agency action, but the striking down of action *in excess of delegated powers, in flat violation of the controlling statute*—there the Labor Management Relations Act, 29 U. S. C. A. § 141 et seq. See 358 U. S. at pages 188-190, 79 S. Ct. at pages 183-184. It should be noted, also, that in Leedom v. Kyne the National Labor Relations Board *did not deny* that it had contravened its governing statute. See 358 U. S. at page 187, 79 S. Ct. at page 183. No such admission is made here, and appellant has not pointed out any clear statutory limitation expressed by the Railway Labor Act which has been violated by the NMB. * * *" (Emphasis added.)

6. There is a demonstrable lack of equity in the application for the injunction against holding the election. ABNE, the no-contract employees' group, claims it repre-

sents more than half of the employees eligible to vote in the election. If so, its remedy is to tell its members either not to vote or to vote for no representation. As shown, if its membership complies with these instructions, there will not be a majority voting for representation and, consequently, no representative will be certified. As indicated during oral argument, this was precisely the result of the voting—or not voting—in the representation election held recently at Lake Central Airlines. No irreparable injury is shown, therefore, if the election here is conducted as ordered by the Board.

This litigation is a throwback to the early days of the 1900's when federal courts were used to deliver individual workmen unrepresented to the bargaining table of their employer. See, *e.g.*, *Adair* v. *United States*, 208 U. S. 161 (1908); *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923). I thought those days were over.

I regret my inability to agree with my distinguished brethren in respect to this litigation. Respectfully I dissent from the court's ruling upholding this injunction.

APPENDIX C.

UNITED STATES DISTRICT COURT
For the District of Columbia.

United Air Lines, Inc., *Plaintiff*,
vs.
National Mediation Board, et al., *Defendants*.
Civil No. 402-63.

Order.

Upon consideration of defendants' motion to dismiss or in the alternative for summary judgment, plaintiff's motion for preliminary injunction, and the Court having considered the pleadings, affidavits and exhibits of record, and the parties having filed memoranda of points and authorities in support of and in opposition to said motions, and after hearing oral argument by counsel for the respective parties in open court, and the Court having determined that there is no genuine issue of material fact it is by the Court this 25th day of March, 1963,

ORDERED: that defendants' motion for summary judgment be, and the same is, hereby granted; and the complaint be, and the same hereby is, dismissed with prejudice, and it is

FURTHER ORDERED: that plaintiff's motion for preliminary injunction be, and the same hereby is dismissed as moot.

BURNITA SHELTON MATTHEWS,
United States District Judge.

Seen
STUART BERNSTEIN.

APPENDIX D.

Constitutional and Statutory Provisions Involved.

U. S. Constitution, Amend. V:

"... [N]or shall any person ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Railway Labor Act:

Section 2 Fourth, 48 Stat. 1187, 45 U. S. C. § 152 Fourth:

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions. *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, in-

dividually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2 Ninth, 48 Stat. 1188, 45 U. S. C. § 152 Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Wagner Act:

Section 7, 49 Stat. 452:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 9(a), 49 Stat. 453:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."